



## **7. DEUTSCHER INSOLVENZRECHTSTAG 2010**

**- WISSENSCHAFT, RECHTSPRECHUNG, PRAXIS -**

**17. bis 19. MÄRZ 2010**

**Aktuelle Erfahrungen aus US-amerikanischen  
Insolvenzen**

Burton R. Lifland, Bankruptcy Judge  
of the Southern District of New York

## BERLIN 2010

### **THE BANKRUPTCY LANDSCAPE AFTER 2009: 363 SALES & CREATIVE ALTERNATIVES TO TRADITIONAL REORGANIZATION PLANS**

- A. Introduction** – The Effect of the Global Economic Crisis on Corporate Bankruptcies
- B. 363 Sales** – Advantages and Disadvantages
  - a. Introduction** – The Three “Mega Cases” (GM, Chrysler, and Lehman)
  - b. Basic Issue** – Are Quick Section 363 Sales Being Used to Circumvent Protections Afforded Under the Bankruptcy Code?
  - c. Advantages of 363 Sales**
    - i. Cheaper and More Time Efficient
    - ii. Avoid Plan Confirmation Requirements
    - iii. Preserve Going Concern Value
    - iv. Credit Not Available to Finance Plan Confirmation
    - v. Finality and Section 363(m)
    - vi. Free and Clear of Interests and Liabilities
  - d. Disadvantages of 363 Sales**
    - i. Lack of Transparency and Information
    - ii. Plan Protections Not Provided and Threat of Abuse
    - iii. Time Constraint - Lack of Review
    - iv. Lack of Leverage and Negotiating Power
    - v. Stripping of Interests
  - e. *Lehman Brothers*** – Example of the Negative Consequences of Quick 363 Sales
  - f. The Power of a Chapter 15 Foreign Representative to Effect 363 Sales**
- C. When Are 363 Sales OK? The *Lionel* Decision and *Sub Rosa* Plans**
  - a. *Lionel's* Business Judgment Standard and its Application in GM, Chrysler, and Lehman**
  - b. *Sub Rosa* Plans and the Automobile Industry**
- D. Take Home Messages – What Are Judges Looking For?**
  - a. Extent of Judges’ Discretion**
  - b. Factors to Consider When Deciding Whether to Permit a 363 Sale**
  - c. Justifications for 363 Sales**
- E. Policy Implications of GM, Chrysler, and Lehman; The Future of 363 Sales**
  - a. Have These Cases Loosened the 363 Standards?**
- F. Other Alternatives To Traditional Chapter 11 Plans**
  - a. Prepackaged Bankruptcies**
  - b. Cram Up Reorganizations**
    - i. Reinstatement of Prepetition Debt and Indubitable Equivalent / Deferred Payments
  - c. Selling Substantially All Assets Under a Plan and Precluding Credit Bidding**
- G. Governments’ Increasing Role In U.S. Bankruptcies**
  - a. Madoff Liquidation**
  - b. Roles of the Securities & Exchange Commission, Internal Revenue Service, and Securities Investor Protection Corporation**
- H. Additional Potential Topic For Discussion - UNCITRAL Notes On Cooperation, Communication And Coordination In Cross-Border Insolvency Proceedings**
  - a. Introduction**
  - b. *Madoff* – Example of the Use of Protocols**
    - i. Protocol # 1 – The “Cross-Border Protocol”
    - ii. Protocol # 2 – The “Information Protocol”